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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO**

Elias Stavrinides,  
Kristi Stavrinides

Plaintiffs,

v.

Vin Di Bona, individually, CARA  
COMMUNICATIONS CORPORATION d/b/a/  
Vin Di Bona Productions,

Defendants.

Case No. 3:17-cv-05742-WHO

(Assigned to Hon. William H. Orrick)

**REPLY MEMORANDUM IN SUPPORT  
OF DEFENDANTS VIN DI BONA AND  
CARA COMMUNICATIONS  
CORPORATION'S MOTION TO  
DISMISS PLAINTIFFS' COMPLAINT**

**F.R.C.P. 12(B)(6); 17 U.S.C. § 411(A)**

*[Supplemental Declaration of David E.  
Fink; Declaration of Andreas Becker; And  
Reply Memorandum In Support Of Motion  
To Transfer Venue Filed Concurrently  
Herewith]*

Date: January 10, 2018  
Time: 2:00 p.m.  
Judge: Hon. William H. Orrick  
Courtroom: 2

Action Filed: October 5, 2017  
Trial Date: None Set

1 Defendants Vin Di Bona and Cara Communications Corporation (“Defendants”) submit  
2 this reply memorandum in support of their Motion to Dismiss Plaintiffs’ Complaint (“Motion”).

3 **I.**

4 **INTRODUCTION**

5 Plaintiff Elias and Kristi Stavrinides’ untimely opposition is more telling for what it  
6 concedes than what it contends. *First*, Plaintiffs’ opposition was filed long past the deadline and  
7 should therefore be disregarded in its entirety. Plaintiffs are no strangers to misconduct before  
8 courts in this district, having previously been reprimanded in numerous cases for their failure to  
9 follow court orders and to file opposition papers. *Second*, Plaintiffs’ opposition fails to address  
10 numerous arguments raised in Defendants’ Motion, and therefore concedes those points,  
11 including:

- 12 • Plaintiffs concede that they failed to register the videos at issue in this  
13 dispute (the “Videos”) with the U.S. Copyright Office, and that their claims  
14 are therefore barred under 17 U.S.C. § 411(a);
- 15 • Plaintiffs concede that Mrs. Stavrinides agreed to the terms of the  
16 agreements with Defendants at issue (the “Agreements”) and, instead, limit  
17 their opposition to arguing that her personal decision to review those  
18 agreements on her cell phone renders them unenforceable (a position that  
19 has no merit, as discussed below);
- 20 • Plaintiffs concede that the terms of those Agreements bar outright their  
21 claims against Defendants, and that, if “Defendants had permission or  
22 authorization to use Elias and Kristi’s videos” then “Plaintiffs are wrong  
23 and will sua sponte dismiss the complaint with prejudice.” (Opp. at 5.);
- 24 • Plaintiffs concede that Elias Stavrinides’ claims against Defendants are  
25 likewise barred as a matter of law;
- 26 • Plaintiffs concede that their state law claims are preempted and that their  
27 declaratory relief claim is both premature and duplicative, and therefore,  
28 that those claims should be dismissed; and
- Plaintiffs concede that their claims for statutory damages and attorneys’ fees  
are barred as a matter of law since they failed to register the Videos as  
required by 17 U.S.C. § 412.

Because Plaintiffs do not challenge these positions in their opposition, Defendants do not address  
them herein. *Third*, Plaintiffs’ untimely opposition is limited to arguing that Mrs. Stavrinides

1 made the decision to review the Agreements on her cell phone and therefore, according to  
2 Plaintiffs, she should therefore not be bound by their terms. As discussed at greater length below,  
3 this argument, ridiculous on its face, finds no support in the law and is entirely disingenuous.

4 For the reasons discussed in Defendants' Motion and herein, Defendants respectfully  
5 request that the Court dismiss this action with prejudice.

## 6 II.

### 7 **PLAINTIFFS' UNTIMELY OPPOSITION SHOULD BE DISREGARDED**

#### 8 **A. Plaintiffs' Opposition Is Untimely And Can Be Disregarded**

9 Plaintiffs Elias and Kristi Stavrinides failed to file oppositions to Defendants' Motion in a  
10 timely fashion, or even a week within the due date. Pursuant to Northern District Civil Local Rule  
11 7-3(a), an opposition to a motion must be filed and served not more than fourteen (14) days after  
12 the motion was filed. Here, Defendants filed and served their Motion on December 4, 2017, and  
13 therefore Plaintiffs' opposition was due no later than December 18, 2017. No opposition was filed  
14 or served that day. Instead, Plaintiffs belatedly emailed Defendants a copy of their opposition a  
15 week later, just after 9 p.m. on Christmas day, December 25, 2017. (Supplemental Declaration of  
16 David E. Fink ("Supp. Fink Decl."), Ex. A.)<sup>1</sup> Essentially, Plaintiffs emailed their opposition on a  
17 holiday evening, the day before Defendants' reply memorandum would have been due, had  
18 plaintiffs filed a timely opposition. The prejudice to Defendants from Plaintiffs' stratagem is self-  
19 evident. Plaintiffs then waited until December 28, 2017 file their opposition (which was entered  
20 on the docket the following day), making it ten days late.<sup>2</sup> The Court may therefore disregard that

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22 <sup>1</sup> The oppositions to both motions were purportedly served by mail on December 22, 2017 by  
23 Plaintiffs' unlicensed "attorney in fact," Ronald Cupp. (Supp. Fink Decl., Ex. A (email stating  
24 "[t]hese went out Friday" and attaching copies of oppositions with unsigned proofs of service  
25 dated December 22, 2017).) In Plaintiffs' December 25, 2017 email to Defendants, however, Mr.  
Cupp is included on the email and is asked by Elias Stavrinides to "[p]lease review" the  
documents he supposedly mail served three days prior. (*Id.*) Moreover, the documents' metadata  
reveals that the copies of the documents sent to Defendants were edited as late as December 23,  
2017. (Declaration of Andreas Becker, ¶ 3.)

26 <sup>2</sup> If Plaintiffs had filed their opposition on time, Defendants would have filed and served this reply  
27 memorandum "not more than 7 days after the opposition was due," *i.e.*, by December 26, 2017.  
28 However, Plaintiffs' opposition did not appear on the online docket until past 9:00 p.m. on  
December 29, 2017, after the office of Defendants' counsel had closed for the holiday weekend.

1 opposition for failing to comply with the Local Rules' filing deadline.<sup>3</sup> *E.g., Chingyee Lengnou*  
2 *Xiong v. Veneman*, No. 1:02-CV-6525-SMS, 2005 WL 3557176, at \*4 (E.D. Cal. Dec. 22, 2005)  
3 ("The Court in its discretion may refuse to consider matters that are not timely filed as a result of  
4 inexcusable neglect."); *Perdana Capital Inc. v. Chowdry*, No. C 09-1479 RS (JL), 2010 WL  
5 11475933, at \*2 (N.D. Cal. Sept. 2, 2010) ("Plaintiff's untimely opposition did not offer any  
6 explanation for failing to comply with the local rules, and thus may properly be disregarded[.]")  
7 (citing *Chingyee*).

8 **B. Plaintiffs Have Previously Been Reprimanded By Northern District Courts For Their**  
9 **Failure To Timely Oppose Motions And To Follow Court Rules And Orders**

10 Plaintiffs have made a habit out of ignoring the rules in the Northern District of California.  
11 Plaintiffs have filed multiple lawsuits in this district and have repeatedly failed to prosecute those  
12 actions, failed to follow court orders, and – tellingly – failed to file oppositions to motions to  
13 dismiss, often leading to the dismissal of those cases. Plaintiffs cannot plead ignorance to the  
14 procedures in this court, or the consequences of failing to follow court rules, orders, and deadlines.  
15 Courts in this district have addressed Plaintiffs' misconduct and flatly rejected arguments based on  
16 Plaintiffs' supposed ignorance of the rules or their *pro per* status, *e.g.*:

- 17 • *Elias Stavrinides and Kristi Stavrinides v. Bell Home Loans, Inc., et al.*, Case  
18 No. 3:14-cv-00573-MMC (N.D. Cal.), **Dkt No. 28** (Order to Show Cause why  
19 Plaintiffs' case should not be dismissed for failure to prosecute, after Plaintiffs  
20 failed to appear as ordered at a regularly scheduled CMC); **Dkt No. 34** (Order  
21 granting defendants' motion to dismiss Plaintiffs' federal claims after Plaintiffs  
22 failed to file an opposition); **Dkt No. 36** (Order denying Plaintiffs' request to  
23 extend time after Plaintiffs failed to oppose defendant's motion to dismiss)<sup>4</sup>;

24 Defendants have therefore filed this reply memorandum on the first day following that holiday  
25 weekend.

26 <sup>3</sup> In their opposition, Plaintiffs cite the North Bay Fires—which were contained by the end of  
27 October—as a basis for their delay. However, not once in prior correspondence with Defendants  
28 did Plaintiffs request an extension of time to file and serve their opposition papers. Instead, they  
waited until Christmas evening to surprise Defendants with their oppositions.

<sup>4</sup> That order determines, among other things, that Plaintiffs attempted to blame their failure to  
timely respond to the defendants' motion to dismiss on their *pro per* status. The Court rejected  
that argument: "[P]laintiffs state they are 'not represented by counsel,' have 'actively been seeking  
representative legal assistance,' and are 'not schooled in legal matters.'... [T]he Court notes that

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- *Elias Stavrinides v. Pacific Gas and Electric Company*, Case No. 3:15-cv-03118-WHA (N.D. Cal.), **Dkt No. 18** (Order to Show Cause why Mr. Stavrinides’ case should not be dismissed for failure to prosecute after he failed to file an opposition to motion to dismiss; ordering him to file opposition or statement of non-opposition); **Dkt No. 26** (Order to Show Cause why case should not be dismissed for failure to prosecute after Mr. Stavrinides failed to respond to prior order to show cause; re-ordering plaintiff to file opposition or statement of non-opposition); **Dkt No. 27** (Order Dismissing Case for failure to prosecute after Mr. Stavrinides failed to respond to two prior orders to show cause); **Dkt No. 30** (Order denying Plaintiff’s request for re-consideration, and rejecting, among other things, argument that Plaintiff “did not know he needed to respond to defendant’s motion to dismiss”); and
  - *Elias Stavrinides v. Pacific Gas and Electric Company*, Case No. 3:16-cv-00433-WHA (N.D. Cal.), **Dkt No. 16** (Order to Show Cause why Plaintiff failed to file a timely opposition to motion to dismiss); **Dkt No. 24** (Order re Motion to Dismiss, granting defendant’s motion to dismiss on res judicata grounds, and discussing Plaintiff’s prior failures to respond to orders to show cause).

12 Indeed, in numerous prior filings spanning the course of several years, Plaintiffs have  
13 provided the *exact* excuse, in “cut and paste” form, from their “Standard of Review for *Pro Se*  
14 Pleadings” herein, *i.e.*:

15 Plaintiff [sic] admits to some technical missteps attributable to the learning curve.  
16 However, none of which is fatal to his [sic] claim as will be demonstrated below.  
17 The Plaintiff is [sic] proceeding without the benefit of legal counsel.  
18 Additionally, he is [sic] not a practicing attorney nor has he [sic] been trained in  
19 the complex study of law. As such, Plaintiff’s [sic] pro se papers are to be  
20 construed liberally. “A pro se litigant should be given a reasonable opportunity to  
21 remedy defects in his pleadings if the factual allegations are close to stating a  
claim for relief.” Accordingly such pleadings should be held to a less stringent  
standard than those drafted by licensed, practicing attorneys. The Court is the  
Guardian of ‘my’ [sic] liberties and “Court errs if court dismisses pro se litigant  
without instruction of how pleadings are deficient and how to repair pleadings.”

22 (*Compare* Opp. at 2 with *Elias Stavrinides and Kristi Stavrinides v. Bell Home Loans, Inc., et al.*,  
23 Case No. 3:14-cv-00573-MMC, Dkt No. 9; *Ronald Cupp and Elias Stavrinides v. Katie Straley, et*  
24 *al.*, Case No. 3:15-cv-01565-JD, Dkt No. 10; *Elias Stavrinides v. Pacific Gas and Electric*

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26 plaintiffs filed the instant action in state court on December 3, 2012 ... and, over the course of the  
27 ensuing eighteen months, have proceeded to litigate the matter without assistance of counsel ....  
Under such circumstances, the instant request, even if considered on its merits, fails for lack of  
good cause.” (*Id.*)

1 *Company*, Case No. 3:16-cv-00433-WHA, Dkt No. 17.) At bottom, Plaintiffs cannot plead  
2 ignorance of the consequences of their failure to oppose Defendants’ Motion in a timely manner,  
3 being intimately familiar with the procedures for litigating in this district and the consequences of  
4 disregarding court rules and procedures and of failing to timely respond to a motion to dismiss.<sup>5</sup>

5 **III.**

6 **THIS CASE SHOULD BE DISMISSED WITH PREJUDICE**

7 Even were the Court to consider Plaintiffs’ untimely opposition, dismissal is nevertheless  
8 mandated by well-established law. As already discussed, Plaintiffs’ opposition does not address  
9 numerous, material arguments raised in Defendants’ Motion. Instead, the gravamen of Plaintiffs’  
10 opposition is that Mrs. Stavrinides failed to read carefully the agreements at issue because she  
11 decided to review them on her cell phone. (Opp. at 4, 5.) This position, raised for the first time in  
12 Plaintiffs’ opposition, actually supports the conclusion that Plaintiffs’ complaint should be  
13 dismissed – Mrs. Stavrinides’ sole defense for allegedly not reading the contracts is that *she*  
14 *decided* to open them on her cell phone. This argument lacks merit on its face.

15 Plaintiffs separately request leave to amend. However, as discussed in Defendants’  
16 Motion, leave to amend would not cure the numerous defects in Plaintiffs’ Complaint. Mrs.  
17 Stavrinides does not deny—and even concedes—that she signed the agreements at issue. The  
18 plain and unambiguous terms of those agreements would not change if Plaintiffs were granted  
19 leave to amend. As such, this case should be dismissed with prejudice.

20 **A. Mrs. Stavrinides’ Alleged Decision To Review The Agreements On Her Cell Phone**  
21 **Does Not Affect Their Enforceability**

22 Plaintiffs do not dispute that Mrs. Stavrinides agreed to the terms of the “Home Video  
23 Description Form” and the “Exclusive Grant of Rights, Appearance and Shooter Release”  
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25 <sup>5</sup> The fact that Plaintiffs, particularly Elias Stavrinides, have repeatedly brought frivolous lawsuits  
26 that were dismissed due to their failure to prosecute and based on their disregard for court orders  
27 may ultimately warrant a determination that they are vexatious litigants. *E.g., De Long v.*  
28 *Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990) (listing factors to be considered, including,  
among others, frivolousness). Defendants reserve their right to seek entry of such an order.

1 (collectively, the “Agreements”) when she submitted the Videos to America’s Funniest Home  
2 Videos (“AFV”). (*E.g.*, Opp. at 5 (“We agreed [sic] Kristi did ‘click’ agreed to.”).)<sup>6</sup> Instead, they  
3 take the position that Mrs. Stavrinides should not be bound by those Agreements because *she*  
4 *made the decision* (allegedly) to review those Agreements on her phone. (Opp. at 4, 5.) Even  
5 taking this argument as though it were true, it is nevertheless a nonstarter. Mrs. Stavrinides was  
6 free to review the Agreements on whatever device or in whatever manner she chose. She was  
7 under no obligation to review them at any particular time or within any particular time period. She  
8 cannot blame Defendants for her poor decision (allegedly) to read the Agreements on her phone.

9 As discussed in Defendants’ Motion, a “cardinal rule of contract law is that a party’s  
10 failure to read a contract, or to carefully read a contract, before signing it is no defense to the  
11 contract’s enforcement.” *Desert Outdoor Advert. v. Superior Court*, 196 Cal. App. 4th 866, 872  
12 (2011); *see also Brown v. Wells Fargo Bank, NA*, 168 Cal. App. 4th 938, 959 (2008) (“Generally,  
13 it is *not reasonable* to fail to read a contract .... Reasonable diligence requires a party to read a  
14 contract before signing it.”) (emphasis in original; citations omitted); *Madden v. Kaiser Found.*  
15 *Hosps.*, 17 Cal. 3d 699, 710 (1976) (noting the “general rule that one who assents to a contract is  
16 bound by its provisions and cannot complain of unfamiliarity with the language of the  
17 instrument”). Plaintiffs’ arguments about the Agreements’ enforceability is therefore closed at the  
18 outset.

19 Nevertheless, Plaintiffs take the argument one step further. Whereas their complaint  
20 merely alleged that Mrs. Stavrinides could not read the text because it was too small, Plaintiffs  
21 now take the position (in their opposition) that Mrs. Stavrinides should not be bound by the  
22 Agreements because *she unilaterally made the decision* to open those contracts on her cell phone.  
23 Plaintiffs apparently seek to create an escape clause by which any contracting party can avoid his  
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25 <sup>6</sup> Although Plaintiffs do not dispute that an online signature is valid, such an argument would  
26 likewise be a nonstarter. California and federal law both treat an electronic signature with equal  
27 force as a physical signature under, respectively, the Uniform Electronic Transactions Act, Civ.  
28 Code § 1633.1, *et seq.*, and the Electronic Signatures in Global and National Commerce (E-Sign)  
Act, 15 U.S.C. § 7001, *et seq.*

1 or her contractual obligations just by reading a contract on a small device. Nonsense. Mrs.  
2 Stavrinides was not required – or even encouraged – to open these documents on a small, mobile  
3 device, nor do Plaintiffs allege as much. She had numerous ways in which she could have  
4 reviewed the Agreements in a larger format, including by reviewing them on a computer, where  
5 she could have zoomed in on the text,<sup>7</sup> or by printing the documents so the she, her husband, or  
6 any other third party could read them. Whatever it may have been that prompted her (alleged) ill-  
7 informed decision to open those documents on a mobile device, the point is that *she made the*  
8 *decision* to do so. Mrs. Stavrinides cannot now evade the terms of those Agreements and strip the  
9 Defendants of the rights she transferred to them because of her poor decision making.<sup>8</sup>

10 On top of being legally unsupported, Plaintiffs’ argument is entirely disingenuous. Mrs.  
11 Stavrinides did not merely “‘click’ agreed to” when she entered into the Agreements with  
12 Defendants. (Opp. at 5.) Instead, she (i) checked off numerous boxes, including ones where she  
13 indicated that she was both the owner and shooter of the Videos; (ii) filled out information  
14 including her name and contact information; and (iii) electronically signed the Agreements via an  
15 application called DocuSign. Each of these steps required her to read the terms of the  
16 Agreements, including so that she could fill out the correct contact information. She clearly was  
17 able to read the Agreements.<sup>9</sup>

18 Finally, Plaintiffs’ argument simply disregards the nature of the transaction between Mrs.  
19 Stavrinides and Defendants. She submitted Videos to Defendants so that they might be shown on  
20 AFV, a television show, to have the Videos considered to be shown on television or online. The  
21 very nature of this transaction would require her to give Defendants the permission and right to  
22 ///

23 \_\_\_\_\_  
24 <sup>7</sup> Notably, many (if not most) cell phone applications would equally have allowed Mrs.  
25 Stavrinides to zoom in on the text of the Agreements.

26 <sup>8</sup> The substance of the Agreements is discussed in detail in Defendants’ Motion. Among other  
27 things, however, Mrs. Stavrinides irrevocably transferred and separately licensed all of her rights  
28 in the Videos to Defendants.

<sup>9</sup> Moreover, if Mrs. Stavrinides is sophisticated enough to upload videos and fill out contracts on  
her cell phone, she is also sophisticated enough to know that a cell phone was not her only option  
for doing those things.



1 use those Videos. Mrs. Stavrinides simply cannot claim, with an ounce of credibility, that she did  
2 not know she was giving the Defendants the right to use the Videos.

3 **B. Dismissal With Prejudice Is Appropriate—The Defects In Plaintiffs’ Complaint**  
4 **Cannot Be Cured Via Amendment**

5 Plaintiffs seek leave to amend their complaint, which should be denied. Dismissal should  
6 be granted with prejudice where amendment would be futile. *E.g., Albrecht v. Lund*, 845 F.2d  
7 193, 195 (9th Cir.), *amended*, 856 F.2d 111 (9th Cir. 1988) (“[I]f a complaint is dismissed for  
8 failure to state a claim upon which relief can be granted, leave to amend may be denied, even if  
9 prior to a responsive pleading, if amendment of the complaint would be futile.”); *Dougherty v.*  
10 *City of Covina*, 654 F.3d 892, 901 (9th Cir. 2011) (same, quoting *Albrecht*). Where the complaint  
11 cannot be saved by amendment, dismissal with prejudice and without leave to amend is proper.  
12 *E.g., Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Here, granting  
13 Plaintiffs leave to amend would not alter the plain and unambiguous language of the Agreements,  
14 which irrevocably grant Defendants the unfettered right to exploit the Videos, both pursuant to a  
15 transfer and a license. The four corners of those documents are case dispositive, and Plaintiffs do  
16 not dispute the terms or existence of the Agreements. As the defects in Plaintiffs’ complaint  
17 cannot be cured via amendment, dismissal with prejudice and without leave to amend is  
18 appropriate.

19 **IV.**

20 **CONCLUSION**

21 For all the forgoing reasons, as well as those discussed in their Motion, Defendants  
22 respectfully request that the Court dismiss this action in its entirety and with prejudice.

23 DATED: January 2, 2018

KELLEY DRYE & WARREN LLP  
David E. Fink  
Andreas Becker

25 By: /s/ David E. Fink  
26 David E. Fink  
27 Attorneys for Defendants  
28 Vin Di Bona and Cara Communications  
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